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June 29, 2001

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th St. S.W.
Washington, D.C. 20554

Re: Western Wireless Corporation Petition for Designation
as an Eligible Telecommunications Carrier and for
Related Waivers to Provide Universal Service to the
Crow Reservation in Montana, CC Doc. No. 96-45, DA
99-1847

Western Wireless Corporation Petition for Designation
as an Eligible Telecommunications Carrier for the Pine
Ridge Reservation in South Dakota, CC Doc. No. 96-
45, DA 01-278

Petition of the State Independent Alliance and the
Independent Telecommunications Group for a
Declaratory Ruling that the Basic Universal Service
Offering Provided by Western Wireless in Kansas is
Subject to Regulation as Local Exchange Service, WT
Docket No. 00-239

Ex Parte Submission

Dear Ms. Salas:

On June 28, 2001, Mary Sisak and Benjamin Dickens, of Blooston, Mordkofsky, Dickens, Duffy and Prendergast, representing Golden West Telephone Cooperative and David Cosson representing Great Plains Telecommunications, Project Telephone Company and Range Telephone Cooperative, met with Lisa Boehley, Andrea Kearney, Linda Kinney and Susan Steiman of the Office of General Counsel to discuss the above proceedings. The discussions covered the following subjects:

The Telephone Company representatives explained that to the extent tribal governments have regulatory jurisdiction over a non-member telephone company under the first exception to the general prohibition expressed by the Supreme Court in *Montana*, such jurisdiction is not exclusive and does not conflict with, nor preempt, the authority of a state Commission to act on applications for Eligible Telecommunications Carrier ("ETC") designation. Preemption of state jurisdiction under all modern Supreme Court jurisprudence only occurs where the state action would interfere with a federal, Indian-specific program. Here there is no conflict because Congress determined that in the normal course states would act on ETC requests. Nor does state action interfere with a tribe's right to govern itself because tribes have no authority from Congress to act on ETC requests.

As an alternative to a finding that the state does not have authority as a matter of federal law, the question of whether the Commission could find as a matter of state law that the state commissions in Montana and South Dakota do not have jurisdiction to regulate telephone service provided by non-Indians on the respective reservations was also discussed. We expressed the view that the Commission could in theory, reach such a legal conclusion, although it would be highly unusual. We pointed out, however, that there is nothing in the record to suggest that the assertions of jurisdiction by the two commissions are invalid as a matter of state law.

It was also noted that in the *Twelfth Report and Order* the Commission refused to disturb the South Dakota PUC's ETC designation of the Cheyenne River Sioux Tribal Telephone Authority. Having accepted state jurisdiction in South Dakota to grant ETC designation to a tribally owned carrier operating on its own reservation, a Commission finding that the state has no authority to act on an ETC application submitted by a non-tribal company for another reservation would conflict with its previous action.

The recent decisions of the Supreme Court in *Atkinson Trading Co., Inc. v. Shirley* and *Nevada v. Hicks* were discussed. In *Atkinson* the Court found that the Navajo Nation could not impose an hotel occupancy tax on non-members on non-Indian fee land. The Court noted that the first exception to the general rule of *Montana*, which permits tribal regulation of non-members who enter into consensual relationships with the tribe, was not applicable because neither the hotel nor its guests have entered such a relationship.

We stated that a necessary implication of the *Atkinson* case is that whatever relationship Western Wireless may have consented to with the tribal governments could not form a basis for finding that the tribes have exclusive regulatory jurisdiction preempting state regulation of service provided to non-tribal member customers, especially those living on fee lands. In this regard we also noted that because Western Wireless is a common carrier, it cannot refuse to provide service to anyone in its licensed service area, whether or not they are members of the tribe, and that this obligation does not depend upon designation of Eligible Telecommunications Carrier status, but is a condition of its common carrier license. If Western Wireless is presently refusing to provide its service to non-members, such refusal is inconsistent with its license obligations. Moreover such a

refusal to serve non-members does not bolster its argument that the state does not have jurisdiction, because its obligation to serve the entire public exists whether or not it is an ETC.

We also discussed the recent decision of the U.S. Supreme Court in *Nevada v. Hicks* in relation to the 1990 decision of the South Dakota Supreme Court in *South Dakota v. Spotted Horse* upon which Western Wireless relies. Both cases involved the authority of non-tribal law enforcement officers to enter a reservation in regard to crimes or suspected crimes committed off the reservation. The South Dakota court had found the entry was unauthorized in that South Dakota had not complied with requirements of Public Law 280 to establish its jurisdiction on the reservation. In *Hicks*, the Supreme Court found that the tribal court had no authority to try state game wardens for trespass. The Court found that Congress has not removed states' inherent jurisdiction on reservations with regard to off-reservation violations of state law. In the course of its decision, the Court emphasized the very limited authority of tribal governments to regulate non-members.

Whether or not *Hicks* effectively supersedes the rationale in *Spotted Horse*, the South Dakota Supreme Court itself in its subsequent decision in *Cheyenne River Sioux Tribe v. Public Utilities Commission*, 1999SD 60, ("CRST") found that the South Dakota Public Utilities Commission ("SDPUC") was fully within its rights to refuse to authorize US West (now Qwest) to transfer an exchange located on the Standing Rock Reservation. If *Spotted Horse* meant that there was no state authority over telephone companies operating on reservations, the Court could not have reached the decision it did in *CRST*.

The checkerboard nature of the land holdings on the Reservations was discussed, during which the telephone company representatives expressed the view that it was not possible to have separate federal and state ETC designations for the areas within the reservation boundaries representing trust and fee lands, respectively. There was also discussion of the meaning of the term "jurisdiction" in Section 214(e)(6) of the Act, and whether that term encompassed only circumstances where a state commission's jurisdiction was completely lacking over a carrier. The telephone representatives expressed the view that at a minimum, a state commission must have authority to grant ETC designation, such as in Montana, but reiterated that while other aspects of state regulatory authority could theoretically conflict with tribal regulation, that could not occur in these cases involving ETC designation, because tribal regulation cannot extend to ETC designation under the Act. Where states have been preempted, it is in cases such as *Mescalero Apache* where the state sought to enforce game laws directly conflicting with tribal game laws enacted as a part of a tribal specific federal program to promote recreational hunting and fishing.

In order to prevent forum shopping, the *Twelfth Report and Order* specifies that ETC applications may not be filed with the Commission if a state application has previously been filed. Western Wireless asserted in an *ex parte* that it had modified its pending South Dakota application to eliminate Golden West and Great Plains from the requested service area. It was noted that Fort Randall Telephone Company, which also serves on the Pine Ridge Reservation, was still included in

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the South Dakota application. The Telephone Company representatives also expressed the view that both the federal and state applications for ETC designation rested upon a showing of provision of the supported services described in the Commission's rules, that whatever additional features Western Wireless might offer on the Pine Ridge Reservation that it did not offer elsewhere in the state, were irrelevant to the question of duplicate applications.


Finally, we explained that state authority over the service for which Western Wireless seeks ETC designation is not restricted by Section 332 of the Act, because the service involves a station which does not "ordinarily" move as that term is used in Section 3(28) of the Act with the result that the service is not mobile. A sample of the Telular Phonecell unit was demonstrated.

At staff request, the representatives of Golden West agreed to provide for the record additional data concerning its provision of telephone service on the Pine Ridge Reservation.

If there are any questions in this matter, please contact one of the undersigned. Two copies of this letter are provided for each proceeding referenced.

Sincerely yours

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